No. 5689

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IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

ALAMEDA INVESTMENT COMPANY, a corporation, et al., *Appellant,* vs. JOHN P. McLAUGHLIN, etc. *Appellee.*	

BRIEF FOR APPELLEE

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PAUL P. O'BRIEN,
CLERK

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ALAMEDA INVESTMENT COMPANY, a corporation, et al.,

Appellant,

vs.

JOHN P. McLAUGHLIN, etc.

Appellee.

BRIEF FOR APPELLEE

MAY IT PLEASE THE COURT:

Appellants' main contentions I and II present the simple question whether, upon the undisputed facts, the three corporations, (1) Hawley Investment Company, (2) Pacific Nash Motor Company, and (3) Alameda Investment Company, were "affiliated" corporations within the meaning of § 240(c) of Revenue Act of 1921 (42 Stat. 227, 260), with a consequent right to make a "consolidated return" of net income for the calendar year 1922, which would yield $15,087.72 less tax than

separate returns, the amount for which suit is brought.

They were not "affiliated." For a clear exposition of the history and purpose of the legislation, we refer to Appeal of Gould Coupler Co., 5 B.T.A. 499, 514-516; and upon the facts in the record here we adopt the reasoning of the District Court, 28 F.(2d) 81, as adopted and amplified on February 4, 1929, by the Circuit Court of Appeals, Second Circuit, in Commissioner v. Adolph Hirsch & Co., 30 F.(2d) 645. Both of those opinions are concise, clear, and easily accessible, and no useful purpose would be served by reprinting them here. Their reasoning is satisfactory and convincing, and we are not able to add to it. That the facts here are within the holding in the Second Circuit, supra, is plain from the following table of stockholders and their respective percentages of ownership in the three corporations (T. 30-31):

	(1) Hawley	(2) Pacific	(3) Alameda
Stuart S. Hawley	100	......	8
Hawley Corporation	......	100	65.5
C. C. Adams	......	......	1.5
Meek Estate, Inc	......	......	25

Or, if we consider the last item of 25% as owned individually by the stockholders of Meek Estate, Inc., we reach the following result:

	(1) Hawley	(2) Pacific	(3) Alameda
Stuart S. Hawley	100	......	8
Hawley Corporation	......	100	65.5
C. C. Adams	......	......	1.5
Harriet Meek	......	......	12.5
Harriet Hawley	......	......	4.1
Gladys Volkman	......	......	4.2
W. H. Meek	......	......	4.2

Again, if we consider as one the Hawley and Pacific corporations and Stuart S. Hawley, we reach the following result:

	(1) Hawley	(2) Pacific	(3) Alameda
Stuart S. Hawley	100	100	73.5
C. C. Adams	......	......	1.5
Harriet Meek	......	......	12.5
Harriet Hawley	......	......	4.1
Gladys Volkman	......	......	4.2
W. H. Meek	......	......	4.2

During the calendar year 1922, the Hawley and Pacific corporations suffered, respectively, net losses of $36,284.28 and $228,626.42, and the Alameda had a net income of $120,701.76; and the simple fact is that five persons (Adams, the two Meeks, Volkman and Harriet Hawley), having 26.5% of the stock ownership of the profitable corporation, *have no interest whatever* in the two losing corporations.

There is no inconsistency between the authorities cited by us, supra, and the one, Great Lakes Hotel Co. v. Commissioner, 30 F.(2d) 1 (CCA-7), cited by appellants, as it merely applied the statutory principle of taxing as a business unit *what really was a business unit;* that was simply a case of a parent corporation operating through a chain of subsidiary corporations, and the court pointed out, 30 F.(2d), at 3, col. 1, that "all parties seemed to agree that the * * equitable title" to the stock of *all* corporations "rested in the individuals of the Stevens organization;" i. e., the *same* individuals equitably owned *all* the stock. That meets the Second Circuit test of (1) the *same* stockholders, with equitable ownership in *all* the corporations, (2) in

the same *proportion* in each. If the seven cases cited by appellants at their page 21 from the reports of the Board of Tax Appeals be assumed to be correctly decided (the correctness of which assumption we do not pause to consider), at most their effect is no more than to lay down the qualification: "in *approximately* the same *proportion* in each." Here, five persons were stockholders in only *one* of the corporations, and had *neither legal nor equitable ownership* or interest whatever in the two others.

We turn to appellants' final contention III, which takes the question-begging form, "In this case payment *under protest* is not a condition precedent to the recovery of a tax erroneously paid." We do not contend, nor under R. S. § 3226, as amended, could we contend, that there is any longer a requirement of payment under *protest* or *duress* as a condition precedent to recovery back. The form of statement of contention by the appellants misses the point, which is that there can be no right to cast in a *personal* judgment a collector of the revenue who is without fault or wrong in the premises; certainly (if we *assume* that the Congress has such a power) such a result is not to be considered in the absence of express words in the statute, and there are none. The action here is *personal* against the revenue collector, Smietanka v. Indiana Steel Co., 257 U.S. 1, and is indebitatus assumpsit for money received, in which a plaintiff must show *equity and good conscience* on his side:

> "The action of assumpsit for money had and received, it is said by Ld. Mansfield, Burr., 1012,

> Moses v. Macfarlen, will lie in general whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by the ties of natural justice and equity to refund. And by Buller, Justice, in Stratton v. Rastall, 2 T. R., 370, 'that this action has been of late years extended on the principle of its being considered like a bill in equity. And, therefore, in order to recover money in this form of action the party must show that he has equity and conscience on his side, and could recover in a court of equity.' These are the general grounds of the action as given from high authority. There must be room for implication as between the parties to the action, and the recovery must be *ex equo et bono,* or it can never be."
>
> Cary v. Curtis, 3 How. 235, 246.

"*As between the parties to the action*" here, there is nothing to raise a *personal* equity against the collector. It would be violative of the simplest notions of equity, and it would be against conscience, to cast a collector in a *personal* judgment upon the facts here. Here, appellants *voluntarily* paid the tax, without the slightest warning to the collector. By the common law and by all the books, a voluntary payment was not recoverable; an *involuntary* payment was, upon a showing of payment under (1) protest, (2) duress, or (3) "notice of intention to bring suit to test the validity of the claim." An intention of the Congress to change the centuries-old law concerning voluntary payments cannot be fairly read in or into this statute. The statute did not create a new right of action; it simply removed a clog (or, perhaps, only two of the three clogs, supra) from an old one:

"An appropriate remedy to recover back money paid under protest on account of duties or taxes erroneously or illegally assessed, is an action of assumpsit for money had and received. Where the party voluntarily pays the money, he is without remedy; but if he pays it by compulsion of law, or under protest, or with notice that he intends to bring suit to test the validity of the claim, he may recover it back, if the assessment was erroneous or illegal, in an action of assumpsit for money had and received."

Philadelphia v. Collector, 72 U. S. 720, 731;

"The rule is firmly established that taxes voluntarily paid cannot be recovered back, and payments with knowledge and without compulsion are voluntary. At the same time, when taxes are paid under protest that they are being illegally exacted, or with notice that the payer contends that they are illegal and intends to institute suit to compel their repayment, a recovery in such a suit may, on occasion, be had, although generally speaking, even a protest or notice will not avail if the payment be made voluntarily, with full knowledge of all the circumstances, and without any coercion by the actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other means of immediate relief than such payment."

Chesebrough v. U. S., 192 U. S. 253, 259;

"The principle that a tax or an assessment voluntarily paid cannot be recovered back is an ancient one in the common law and is of general application. See Cooley on Taxation, vol. 2 (3d Ed.), p. 1495."

Fox v. Edwards, 287 Fed. 669 (CCA-2).

We have said, supra, that "the statute did not create a new right of action;" certainly, it created no new right of action *against an innocent collector,* whatever the effect may have been to create a new right of action *against the United States,* under the Tucker Act, 28 U. S. C. § 41 (20) on a "claim not exceeding $10,000 founded upon a law of Congress," of which the District Courts have jurisdiction concurrent with the Court of Claims, U. S. v. Emery, 237 U.S. 28, and of which, since November 23, 1921, (42 Stat. 311) the district courts have jurisdiction concurrent with the Court of Claims "even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced."

The "equity and good conscience" of an indebitatus assumpsit at the common law against a collector of the revenue *personally* arose upon, and solely and only upon, the existence of one or more of three *facts*: (1) protest, (2) duress, (3) notice of intention to bring suit. Whether a suit may now be maintained against the United States under the Tucker Act in the absence of protest or duress, but in the presence of the notice, we need not stop to consider, as the suit at bar is not brought directly against the United States under the Tucker Act. None of the three facts, supra, being present here, there is no right to maintain the suit against the collector personally, even though we should assume for the argument that the three corporations were

"affiliated" within the meaning of the statute and in consequence entitled to make a consolidated return.

The judgment should be affirmed.

Respectfully submitted,

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